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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC.,
Petitioners,
VS.
CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and the STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

THE PETITION PRESENTS A LEGAL QUESTION OF FEDERAL STATUTORY INTERPRETATION, AND THERE ARE NO OUTSTANDING FACTUAL ISSUES TO BE RESOLVED

In their Brief in Opposition to Petition for a Writ of Certiorari ("Opposition"), respondents California Depart-

ment of Food and Agriculture, Henry J. Voss, and State of California (collectively, "Respondents") argue that this matter is not ripe for review by certiorari because, they contend, there are a number of disputed factual issues that remain to be resolved. Respondents' contention is untrue and unsupported by the record.

Respondents are correct that judgment was first entered by the trial court upon a motion for summary judgment. Rejecting the very same arguments Respondents now present to this court, the trial court determined that there were no disputed issues of material fact and granted summary judgment in favor of Petitioners.

The California Court of Appeal reversed based on their *legal* interpretation of the scope of the federal Anti-Head Tax Act, 49 U.S.C. § 40116(b) (former 49 U.S.C. App. § 1513). In reaching its conclusion, the Court of Appeal made it clear that it was deciding a *legal* issue:

> *"The essential facts relating to these issues are undisputed;* thus, the issue presented is a question of law involving the interpretation of the two relevant statutes [the federal Anti-Head Tax Act and the state Inspection Fee Act], a matter subject to our independent review."

Pet. App. A-8 (emphasis added).

Thus, the only issue presented by this Petition is whether the California Inspection Fee is prohibited by the terms of former 49 U.S.C. App. § 1513(a). No further factual issues need to be considered or addressed to determine that issue.

As both the trial court and Court of Appeal below concluded, if the California Inspection Fee falls within the statutory scheme of former 49 U.S.C. App. § 1513(a), it is undisputable that the Inspection Fee cannot be saved by the exceptions set forth in former 49 U.S.C. App. § 1513(b). See *Northwest Airlines, Inc. v. County of Kent*, 510 U.S.

____, 114 S.Ct. 855, 127 L.Ed.2d, 183 (1994). The Court of Appeal below stated:

> "As the trial court correctly concluded, the undisputed facts established that the proceeds of the inspection fee in question are not used [for the use of airport facilities], but rather, they are used to finance an inspection program. Therefore, as respondents [Petitioners here] maintain, the service charge is not authorized by the user fee exception found in section 1513(b)."

Pet. App. A-13 (footnote omitted).

II.

CONTRARY TO RESPONDENTS' ARGUMENTS, 49 U.S.C. § 1513(a) IS NOT RESTRICTED TO FEES RELATED TO PASSENGERS

The Court of Appeal opinion below and Respondents here both contend that the Inspection Fee imposed on air carriers, based on "the initial landing" in California of flights from foreign countries (California Food and Agricultural Code § 5353(a)), simply does not fall within the statutory scheme of former 49 U.S.C. App. § 1513. This conclusion is based on the contention that the federal statute is intended only to prohibit "head" taxes on passengers. (Opposition, pp. 7-10.) That conclusion, however, directly conflicts with this Court's decisions in *Northwest, supra,* and *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983).

Indeed, if the Inspection Fee is held to fall outside the statutory scheme, it is difficult to envision what fees are prohibited other than direct charges on passengers. On its face, former 49 U.S.C. App. § 1513(a) does not limit its prohibitions to fees on passengers or related to passengers. As Petitioners argued in the court below, among the prohibited fees are those on the "sale of air transportation," which

under Title 49 is defined as "the transportation of persons *or property* as a common carrier for compensation . . ." 49 U.S.C. §§ 40102(5) and (23) (emphasis added.). Respondents' interpretation of the Act would impermissibly read out the words "or property" from the statutory definition of "air transportation."

Moreover, if the reasoning of Respondents and the Court of Appeal below is accepted, the important public policy embodied in the federal legislation will be emasculated because fees imposed on a per plane basis, rather than a per passenger basis, will be *prima facie* permissible regardless of the governmental entity that imposes the fee (contravening Section 1513(b)'s requirement that airport user fees can only be imposed by entities "owning or operating an airport") or the purpose for which the revenue is used (contravening Section 1513(b)'s requirement that a user fee may only be imposed "for the use of airport facilities").

CONCLUSION

For the foregoing reasons and as set forth in their Petition, Petitioners request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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